

ADOPTED

MEMORANDUM

March 14, 1991

TO: BOSTON REDEVELOPMENT AUTHORITY, AND
STEPHEN COYLE, DIRECTOR

FROM: THEODORE CHANDLER, DIRECTOR OF POLICY PLANNING
SAUL A. SCHAPIRO, SCHAPIRO, HAYS & KELLY, P.C.

SUBJECT: BACK BAY RESTORATIONS COMPANY
PAYMENT OF NOTE AND MORTGAGE

SUMMARY: The Authority holds a note, and first mortgage on certain properties owned by Back Bay Restorations Company which is in Chapter 11 bankruptcy.

The holder of the second mortgage, St. Paul Bank for Savings ("St. Paul"), has foreclosed, and is waiting for final court approval of the foreclosure sale to it. St. Paul is prepared to pay the Authority \$775,000 for its note and first mortgage upon final court approval of the foreclosure sale. This proposed agreement provides for the sale of the Authority's note and first mortgage for \$775,000 plus interest.

In 1985 the Authority sued Back Bay Restorations Company ("BBRC"), the owner of a c.121A apartment project in the Back Bay, for illegally converting units to condominiums. In a settlement of that suit, certain units were removed from c.121A and the conversions in those units were allowed. Part of what the Authority received in return, as part of the settlement, was a \$500,000 note from BBRC and a first mortgage on the remaining properties, located at 148 and 298 Commonwealth Avenue and 199 and 238 Marlborough Street in Boston (the "Properties"), which remain subject to c.121A until May 27, 1991. The note is due on May 27, 1996 except that if any units are sold as condominiums prior to May 27, 1996, a pro-rata share of the principal and interest is payable upon such sale. BBRC is in Chapter 11 bankruptcy. St. Paul Federal Bank for Savings ("St. Paul"), the holder of a second mortgage on the Properties, was allowed to foreclose on its mortgage by the Bankruptcy Court subject to confirmation of the sale by the Court. On October 19, 1990 St. Paul purchased the Properties at a foreclosure sale, subject to the Authority's first mortgage. On December 5, 1990 the Bankruptcy Court confirmed the sale. On December 11, 1990 BBRC appealed this confirmation.

St. Paul is prepared to pay the Authority \$775,000 for the Authority's note and mortgage. The funds would be held in escrow by Bingham, Dana & Gould until BBRC's appeal of the confirmation is finally decided upon by the federal courts. At such time, the funds plus accumulated interest would be paid to the Authority in return for the transfer of the Authority's note, mortgage and any related interests to St. Paul.

It is recommended that the Authority authorize this transaction with St. Paul.

An appropriate vote follows:

VOTED: That the Director is hereby authorized to execute a Payment and Escrow Agreement (the "Agreement"), in substantially the form attached hereto, with St. Paul Federal Bank for Savings ("St. Paul"), to provide for the payment by St. Paul of \$775,000 ("Payment Amount") to the Authority, through Bingham, Dana & Gould, as escrow agent ("Escrow Agent") for all of the Authority's right, title and interest in a Promissory Note dated July 21, 1986 by Back Bay Restorations Company ("BBRC") ("Note") and a first mortgage securing the Note ("Mortgage") on certain properties located at 148 and 298 Commonwealth Avenue, and 199 and 238 Marlborough Street, Boston, Massachusetts (the "Properties"), with such Payment Amount, plus interest, to be released by the Escrow Agent to the Authority upon exhaustion of any appeals or challenges to the December 5, 1990 Bankruptcy Court Order confirming foreclosure sale of the Properties to St. Paul or a final decision, without any further possibility of challenge or appeal, that declines to confirm or that rejects the confirmation of such foreclosure sale to St. Paul. Provided further that the Director is authorized to execute and deliver to St. Paul an assignment of the Mortgage, the Note fully endorsed to St. Paul, and all other documents referred to in the Agreement, and to execute and deliver any other documents necessary to complete this transaction.

PAYMENT AND ESCROW AGREEMENT

PAYMENT AND ESCROW AGREEMENT (this "Payment Agreement"), made as of the _____ day of March, 1991 by and between the BOSTON REDEVELOPMENT AUTHORITY, a public body politic and corporate organized under Chapter 121B of the Massachusetts General Laws, as amended, having its principal office at One City Hall Square, Ninth Floor, Boston, MA 02201 (the "BRA"), and ST. PAUL FEDERAL BANK FOR SAVINGS, a federal savings bank having its principal office at 6700 West North Avenue, Chicago, IL 60635 ("St. Paul").

WHEREAS, the BRA is the holder of a Promissory Note in the original principal amount of \$500,000 dated July 21, 1986 by Back Bay Restorations Company ("BBRC"), as maker, to the BRA, as holder (the "Note"), and a first mortgage securing the Note from BBRC (recorded in the Suffolk County Registry of Deeds at Book 12688, Page 119 (the "Mortgage")) on certain properties located at 148 and 298 Commonwealth Avenue, Boston, Massachusetts and 199 and 238 Marlborough Street, Boston, Massachusetts (the "Properties"); and

WHEREAS, on August 16, 1990, the United States Bankruptcy Court granted a Motion For Summary Judgment in favor of the BRA in adversary proceeding No. 90-1217 in which BBRC had, inter alia, challenged the validity of the Mortgage, and such ruling confirmed the validity of the Note and the Mortgage; and

WHEREAS, St. Paul on October 19, 1990 purchased the Properties at foreclosure sale, subject to the Mortgage, and such purchase was subsequently confirmed by Order of the Bankruptcy Court dated December 5, 1990; and

WHEREAS, on or about December 12, 1990 BBRC filed a Notice of Appeal of the confirmation of the foreclosure sale; and

WHEREAS, the BRA and St. Paul desire to resolve the amount to be paid to the BRA by St. Paul pursuant to the Mortgage;

NOW, THEREFORE, in consideration of the mutual promises herein contained, and for other good and valuable consideration, the receipt and sufficiency of which the parties hereby acknowledge, St. Paul and the BRA hereby agree as follows:

1. Notwithstanding anything to the contrary contained in the Mortgage, the Note, or any other document or instrument, the BRA shall, subject to and in accordance with the terms of this Payment Agreement, assign to St. Paul all of the BRA's right, title and interest in the Mortgage and the obligations and indebtedness secured by the Mortgage upon payment to the BRA by St. Paul of the total amount of Seven Hundred Seventy-Five Thousand Dollars (\$775,000.00) (the "Payment Amount"), less any amount paid to the BRA by BBRC with respect to the Note (such amount not to include any amount paid to the BRA by BBRC pursuant to paragraph 4(b) of the Order for Judgment of the Land Court dated December 5, 1985 in Civil Action No. 116134). On or before March __, 1991, St. Paul will deposit the Payment Amount, by wire transfer of funds or certified check, in escrow, with Bingham, Dana & Gould, as escrow agent ("Escrow Agent"), to be held in escrow in accordance with the provisions of Section 5 of this Payment Agreement. Upon receipt of the Payment Amount, Escrow Agent will give notice of such receipt to the BRA.

2. The Payment Amount, plus interest accrued thereon, shall be released from escrow and paid to the BRA, less any amount paid to the BRA by BBRC with respect to the Note (such amount not to include any amount paid to the BRA by BBRC pursuant to paragraph 4(b) of the Order for Judgment of the Land Court dated December 5, 1985 in Civil Action No. 116134), upon the occurrence of the first of the following:

(i) exhaustion of any appeals of or challenges to the December 5, 1990 Bankruptcy Court Order Confirming Foreclosure Sale to St. Paul ("Confirmation"), or

(ii) a final decision, without any further possibility of challenge or appeal, that declines to confirm or that rejects the confirmation of the sale to St. Paul ("Rejection").

3. Within ten (10) business days following Confirmation or Rejection:

(a) The BRA shall execute and deliver to St. Paul, at the offices of St. Paul's counsel, Bingham, Dana & Gould, at 150 Federal Street, Boston, Massachusetts, the following documents (the "Transfer Documents"), all of which shall be in form and substance reasonably satisfactory to St. Paul's counsel:

(i) an Assignment of Mortgage, Collateral Assignment of Rents, Collateral Assignment of Condominium Rights and Condominium Sales Contracts and UCC-1 Financing Statement (and any other documents recorded or filed to perfect the lien in favor of the BRA upon the Properties), in recordable form;

(ii) the original Note, fully endorsed by the BRA to St. Paul;

(iii) evidence, in recordable form, of the incumbency and authorization of the individual signing such Assignment of Mortgage, Collateral Assignment of Rents, Collateral Assignment of Condominium Rights and Condominium Sales Contracts and UCC-1 Financing Statement and endorsing the Note on behalf of the BRA, and evidence, in recordable form, of the authorizing vote, resolution or other action by the BRA pursuant to which the BRA is acting in accepting the Payment Amount from St. Paul, discharging the Mortgage and endorsing the Note; and

(iv) an accounting of any amounts paid to the BRA by BBRC with respect to the Note (such amount not to include any amount paid to the BRA by BBRC pursuant to paragraph 4(b) of the Order for judgment of the Land Court dated December 5, 1985 in Civil Action No. 116134).

(b) At the time of the delivery of the Transfer Documents by the BRA, St. Paul and the BRA shall execute a joint direction to the Escrow Agent to release the Payment Amount from escrow and said amount shall at that time be delivered to the BRA.

4. The period of the Project, which consists of the Properties, terminates on May 27, 1991. At such time the Properties will be free from all restrictions and limitations imposed by Mass. Gen. Laws ch. 121A, as amended, and St. 1960, ch. 652, as amended (collectively, "Chapter 121A") and the orders, agreements and other matters listed in Schedule 7 attached hereto and made a part hereof, and will be without any of the powers, rights, privileges benefits and exemptions conferred by Chapter 121A. In the event that St. Paul shall wish to sell any condominium unit or building in the Properties before May 27, 1991, it has the right, pursuant to Mass. Gen. Laws ch. 121A, § 16A, to file an application to amend the Report and Decision for the Project. Nothing herein shall affect any rights or remedies

the BRA, the City of Boston, the Commonwealth of Massachusetts or any other party may have against BBRC (other than pursuant to the Note and the Mortgage, if and when such are assigned) under Chapter 121A.

5. The Payment Amount shall be held and delivered by the Escrow Agent as provided in this Section 5. The Escrow Agent shall not release or pay the Payment Amount except in accordance with the terms and conditions of this Section 5.

(a) Delivery of Payment Amount. St. Paul shall deliver to Escrow Agent, and Escrow Agent shall receive from St. Paul and acknowledge to St. Paul receipt of, the sum of \$775,000.00, representing the full amount of the Payment Amount. Escrow Agent shall hold the Payment Amount in escrow and disburse the Payment Amount subject to and in accordance with the terms and conditions of this Section 5.

(b) Investment. Escrow Agent shall invest the Payment Amount in an interest-bearing account accruing interest at the so-called "money market" rate, as announced by Escrow Agent from time to time. Interest accrued on the Payment Amount shall be considered part of the Payment Amount, to be held and delivered as provided in this Section 5. The burden of any loss of all or part of the Payment Amount while in escrow shall be borne by St. Paul, and not by the BRA.

(c) Disbursement of Payment Amount. The Payment Amount shall be held and delivered by the Escrow Agent as follows:

(i) Delivery to BRA Upon Confirmation or Rejection. Upon receipt by the Escrow Agent of a written notice executed on behalf of both the BRA and St. Paul and stating that Confirmation or Rejection (each as defined above) has occurred and that the Payment Amount is to be delivered to the BRA, Escrow Agent shall promptly deliver the Payment Amount and all interest accrued thereon (less any amount paid to the BRA by BBRC with respect to the Note, such amount not to include any amount paid to the BRA by BBRC pursuant to paragraph 4(b) of the Order for Judgment of the Land Court dated December 5,

1985 in Civil Action No. 116134) to the BRA by treasurer's or cashier's check, or by wire transfer of immediately available funds as directed by the BRA in such written notice.

(ii) Delivery to St. Paul Upon Direction by St. Paul and the BRA. In the event that Escrow Agent receives a written notice signed by both BRA and St. Paul so directing, then Escrow Agent shall deliver the Payment Amount and all interest accrued thereon to St. Paul by treasurer's or cashier's check, or by wire transfer of immediately available funds in accordance with the following wire transfer instructions:

St. Paul Federal Bank for Savings
6700 West North Avenue
Chicago, Illinois 60635
A.B.A. No. 271071321
For credit to Account No. _____
Attention: Portfolio Management
Telephone advice to: C. Robert Nicolls

(iii) Delivery in Event of Litigation. In the event that litigation between the BRA and St. Paul shall exist, provided Escrow Agent shall have received notice of such litigation, then Escrow Agent shall continue to hold and invest the Payment Amount until (A) Escrow Agent receives a joint written direction signed by both the BRA and St. Paul or a final judgment rendered by a court of competent jurisdiction directing disbursement of the Payment Amount, in which case Escrow Agent shall then disburse the same and all interest accrued thereon in accordance with such joint written direction or judgment; or (B) Escrow Agent deposits the Payment Amount and all interest accrued thereon with the clerk of the court in which such litigation is pending; or (C) Escrow Agent deposits the Payment Amount and all interest accrued thereon with a court of competent jurisdiction and therein commences an action for interpleader, the costs thereof (including reasonable counsel fees) to Escrow

Agent to be borne by the BRA and St. Paul, jointly and severally. As between the BRA and St. Paul, the party prevailing in any such interpleader action shall be entitled to recover all of its costs (including reasonable counsel fees and any amount paid on account of costs incurred by Escrow Agent) from the other party.

(d) Responsibility of Escrow Agent. Escrow Agent shall not be responsible for the genuineness of any signature or document presented to it pursuant to this Payment Agreement and may act and rely conclusively upon, and shall be protected in acting upon, any list, advice, judicial order or decree, certificate, notice, request, consent, statement, instruction or other instrument believed by it in good faith to be genuine (but without responsibility for ascertaining the accuracy of any statement contained therein) or to be signed or presented by the proper person hereunder, or duly authorized by such person or properly made. Escrow Agent shall not be responsible for or deemed to have knowledge of any of the provisions contained in this Payment Agreement or any other agreement, instrument or document, except the provisions of this Section 5. The duties and obligations of Escrow Agent hereunder shall be governed solely by the provisions of this Section 5, and Escrow Agent shall have no duties or obligations other than those expressly imposed in this Section 5 and shall not be required to take any action other than in accordance with the terms of this Section 5. Escrow Agent shall not be bound by any notice of, or demand with respect to, any waiver, modification, amendment, termination, cancellation, or rescission of this Payment Agreement, unless the same is in writing, and signed by both the BRA and St. Paul, delivered as provided in Section 6 of this Payment Agreement, and, if the duties of Escrow Agent are affected thereby, unless it shall have given its prior written consent thereto. In the event of any controversy or dispute hereunder or with respect to any question as to the construction of this Section 5, or any action to be taken by Escrow Agent hereunder, Escrow Agent shall incur no liability for any action taken or suffered or any

failure to take action, its liability hereunder to be limited solely to willful misconduct on its part.

(e) Fees and Expenses of Escrow Agent. Escrow Agent shall not be paid a fee for acting as escrow agent. The BRA and St. Paul agree, jointly and severally, to pay on demand Escrow Agent's reasonable costs and expenses, including the reasonable fees and expenses of accountants, attorneys or other advisors to Escrow Agent, incurred by Escrow Agent in connection with its duties hereunder.

(f) Indemnification. In consideration of Escrow Agent's acceptance of the appointment as Escrow Agent, the BRA and St. Paul, jointly and severally, agree to indemnify and hold Escrow Agent harmless as to any suit, action, cause of action, charge, liability, debt, cost or claim incurred by Escrow Agent by reason of its having accepted the appointment hereunder or in the performance of its duties hereunder (including any action taken or any failure to take action hereunder), and to reimburse Escrow Agent for all its reasonable expenses, including, among other things, reasonable counsel fees and expenses and court costs, incurred by reason of its position hereunder or its performance hereunder; provided that, in regard to the loss of any or all of the Payment Amount, the BRA shall not indemnify the Escrow Agent in any way. Escrow Agent shall have the right to resign its responsibilities under this Section 5 at any time and, if a successor Escrow Agent has not been designated by the BRA and St. Paul, in that event Escrow Agent may deposit the escrowed funds with any court of competent jurisdiction, whereupon Escrow Agent should be relieved of all further responsibilities under this Section 5. If a successor Escrow Agent has been designated by the BRA and St. Paul, Escrow Agent shall pay over to such successor any escrowed funds held by it, whereupon Escrow Agent shall be relieved from all further responsibilities under this Section 5.

(g) Termination. Upon disbursement of the Payment Amount by Escrow Agent in accordance with the terms of this Section 5, all obligations and duties of Escrow Agent shall terminate; provided, however, that the provisions of subsection (e) and (f) above shall survive such termination.

6. Notices and Communications. Any notice or other communication shall be deemed to have been duly given or made on the earlier of (i) the date of receipt or (ii) the third business day after (and if) the same shall have been posted by certified or registered mail, postage prepaid, return receipt requested, and addressed to the party to whom such notice or other communication is to be given or made at such party's address set forth below, or at such other address as such party shall designate by written notice to the other party, as follows:

If to the BRA:

Boston Redevelopment Authority
One City Hall Plaza
Ninth Floor
Boston, Mass 02201
Attention: Director

with a copy to:

Schapiro, Hayes & Kelly, P.C.
44 School Street
Boston, Massachusetts 02108
Attention: Edward F. Kelly, Esquire

If to St. Paul:

St. Paul Federal Bank for Savings
6700 West North Avenue
Chicago, Illinois 60635
Attention: C. Robert Nicolls

with a copy to:

Bingham, Dana & Gould
150 Federal Street
Boston, Massachusetts 02110
Attention: John R. Snyder, Esquire

If to Escrow Agent:

Bingham, Dana & Gould
150 Federal Street
Boston, Massachusetts 02110
Attention: John R. Snyder, Esquire

provided, that any notice of change of address, and any notice or other communication given otherwise than as specified above shall be effective only upon receipt.

7. Waiver of Conflict of Interest. The parties hereby acknowledge and agree that Messrs. Bingham, Dana & Gould have acted and are acting as counsel to St. Paul and have acted and shall continue to act as counsel to St. Paul in connection with the Properties, BBRC and this Payment Agreement and the transactions contemplated hereby. It is further agreed that Messrs. Bingham, Dana & Gould may continue to represent St. Paul in connection with the Properties, BBRC and the transactions contemplated by this Payment Agreement and in any dispute or litigation which may arise between the parties concerning the Properties, BBRC or arising out of this Payment Agreement or the transactions contemplated hereby, notwithstanding that they are also acting as Escrow Agent hereunder and each of the parties hereby irrevocably waives any right to claim the existence of a conflict of interest with respect thereto.

8. Governing Law. This Payment Agreement has been negotiated, made and entered into and shall be performed in the Commonwealth of Massachusetts. The validity, enforcement and construction of this Payment Agreement shall be governed by the laws of the Commonwealth of Massachusetts.

9. Amendments; Successors. This Payment Agreement may be amended only by an instrument in writing signed by all of the parties hereto and shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

10. Authorization. This Payment Agreement is executed by the Director of the BRA with the approval of the BRA Board. Written evidence of such approval shall be provided to St. Paul by March 21, 1991.

IN WITNESS WHEREOF, the parties hereto have executed this Payment Agreement as an instrument under seal as of the date first written above.

Boston Redevelopment Authority

By: _____
Stephen Coyle
Director

St. Paul Federal Bank for Savings

By: _____
Name: _____
Title: _____
Authorized Officer

Escrow Agent:

Bingham, Dana & Gould

By: _____

SCHEDULE 7

1. Report and Decision under Chapter 121A adopted by vote of the Boston Redevelopment Authority on May 6, 1976, approved by the Mayor of the City of Boston (the "Mayor") on May 24, 1976 and filed with the Clerk of the City of Boston (the "City Clerk") on May 27, 1976.
2. First Amendment to the Report and Decision under Chapter 121A adopted by vote of Boston Redevelopment Authority on February 16, 1978, approved by the Mayor on November 28, 1978 and filed with the City Clerk on December 1, 1978.
3. Second Amendment to the Report and Decision under Chapter 121A adopted by vote of the Boston Redevelopment Authority on December 5, 1985, approved by the Mayor on December 19, 1985 and filed with the City Clerk on March 10, 1986.
4. Third Amendment to the Report and Decision under Chapter 121A adopted by vote of the Boston Redevelopment Authority on June 26, 1986 and approved by the Mayor on July 14, 1986 and filed with the City Clerk on _____, 19__.
5. Order for Judgment dated December 5, 1985, as amended by Amendment to Judgment dated January 28, 1986 and Amendment to Judgment dated April 15, 1986, and Judgment dated April 23, 1986 entered in Boston Redevelopment Authority v. Back Bay Restorations Company, et al. Miscellaneous Case No. 116134, Land Court Division of the Trial Court, Commonwealth of Massachusetts.
6. Regulatory Agreement Pursuant to Massachusetts General Laws Chapter 121A, Section 18C by and between Back Bay Restorations Company and Boston Redevelopment Authority dated March 10, 1986 as recorded with Suffolk County Registry of Deeds in Book 12426, Page 5.

